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Tentative Trust Deposits

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NOTES

TENTATIVE TRUST DEPOSITS

To the bank deposit made by one person "in trust for" another has been applied the fiction of a trust. It is worth considering whether the "as if" method, at least in this situation, is not more productive of confusion than clarification.

For many years it has been customary for depositors, particularly women, to open accounts in banks in their own names in trust for another. This custom arose in some states from the limitations imposed by savings banks on the size of accounts. After a depositor's account had reached the maximum amount allowed by the rules of the bank, it was possible to make further deposits in the same bank by means of a new account in the name of the depositor, but designated in trust for another.

Although the original reason for these deposits has practically disappeared, they have continued to provide a desirable method of saving because of their immunity from inheritance taxes and their escape from the costs and delays of administration.

The factual basis of these deposits is uniformly simple. The depositor

has money over which he wishes to exercise complete control, funds which he may wish to exhaust during his lifetime, but if any balance remains upon his death, it is to be paid by the bank to the designated beneficiary.

This clearly is a testamentary disposition, and admittedly an invalid one, because it does not comply with the statutory requirements for testamentary disposition. If it were a trust, as the declaration accompanying the opening of the account naively suggests, the gift of the remainder at the death of the life tenant would be valid.

It will be conceded with some reluctance perhaps, but with little doubt, that the average trust deposit is not a trust. There are, of course, isolated cases in which a real trust is established in which the depositor relinquishes all interest in the fund, transfers the beneficial ownership immediately to the cestui que trust and gives the passbook to the latter.

In the usual case, however, the salient, the indispensible characteristics of a trust are lacking. There is no separation of legal and equitable ownership, no fiduciary duty on the part of the depositor arises toward the designated beneficiary nor is a correlative right created in the beneficiary to compel his trustee to account. The intention of the depositor is to retain complete control and ownership of the fund in himself and to make a gift of the balance at his death to the designated beneficiary.[1]

The cases, however, show that the impression remained in the minds of the judges that a declaration of trust had been made, even though the only evidence of it was usually a rubber stamp notation made by a bank clerk on a signature card, and that it was therefore natural to view the transaction as if it were a trust. That point marked the birth of the theory of a tentative trust —a trust that did not spring into being until the death of the depositor—and vanished the moment of its creation.[2]

The application of the trust idea to these deposits is undoubtedly useful in arriving at a final solution of the problem. As Vaihinger has pointed out, the justification for the application of a fiction is its utility in solving a given problem. The mind is baffled by conflicting forces and grasps at an admit-

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[1]Brady: Bank Deposits, p. 27.

[2]In Re Totten, 179 N. Y. 112: "After much reflection upon the subject, guided by the principles established by our former decisions, we announce the following as our conclusion: A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

See Comments in 33 Columbia Law Review 548; also 14 Yale Law Journal No. 6, page 315; Lewin on Trusts, p. 62; Perry Law of Trusts and Trustees, Section 82; Gaffney's Estate, 146 Pa. 49; Merigan v. McGonigle, 205 Pa. 321; American Law Institute, Tentative Draft of the Restatement of the Law of Trusts, page 125.

tedly erroneous conception for the purpose of clarifying its reasoning and effecting a desired objective.[3]

It is perhaps illuminating to see just how the juristic fiction operates. The trust deposit is not a trust, and we know it is not, but we will treat it *as if* it were a trust. If we do this, we have at the death of the depositor, an opportunity to terminate the trust and pay the trust res to the beneficiary, because the depositor intended that the trust should terminate at his death.

Apart from the mental obscurantism which this type of reasoning engenders, one cannot quarrel with the result obtained thereby as it carries out the intention of the owner of the fund. But a real difficulty arises before that result is obtained, which is that during the continuance of the deposit, rights which are realistic and objective, must be determined. There ought, therefore, to be no surprise if the fiction—a subjective auxiliary construct—clashes with the objective experience which arises and demands solution. Herein lies the fundamental difficulty with juristic fictions. This danger is envisaged by Vaihinger.[4]

Two examples will illustrate the defect in applying the fiction of a trust to these trust deposits.

Let us suppose that A opens an account in trust for B. The fiction of a trust is applied to the transaction with the result that A is trustee and B cestui que trust and the bank account constitutes the trust res. X is a creditor of B and attaches the fund. Now the trust which was merely a fiction—a subjective auxiliary construct—has come into conflict with an objective experience and the result is confusion.

It is clear that the creditor of B has no right to attach the fund, the legal and equitable title of which repose in A.[5] And it is equally clear that a creditor of A should be entitled to satisfy his claim against A out of the deposit.[6]

A further illustration of rejection of the fiction and the necessity of loyalty to reality is found in those cases in which the depositor disposes of the deposit

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[3]Vaihinger's "Als Ob", p. 120: "the psyche proceeds in order to solve certain difficult problems, by simply turning aside to evade difficulties and attempting to attain its goal indirectly."

[4]Vaihinger's "Als Ob", p. 134: "Thought of its own accord twists the threads furnished by experience into knots. These sometimes aid it but may also entrap it, especially if they are supposed to be something in objective experience itself, instead of what they really are—subjective auxiliary constructs."

[5]In Kelly General Finance Co., 16 D. & C. 435 (Pa.) the court refused to permit a creditor of the beneficiary of a trust account to attach the fund: "The case before the Court may be disposed of on the ground that, though the deposit is in form a trust deposit, it is in fact not so, because the depositor has made withdrawals from time to time from her funds, treating it as her own; or, if notwithstanding her withdrawals, her deposit in the form made could be construed to be a declaration of trust in favor of the beneficiary, she revokes it by her claim to it filed in this case."

[6]42 Yale Law Journal 1137; 43 Harvard Law Review 528; Beakes Dairy Co. v. Berns, 128 App. Dist. Sup. Ct. 137 (N. Y.); In Re Reich's Estate, 262 N. Y. S. 623.

by a will. In a recent Pennsylvania case,[7] a woman opened a savings account in trust for her husband. On the day of her death, she wrote a will, stating that she had money on deposit in a certain bank (the one in which was the trust deposit) and that she wished it divided among her sisters, brothers, nieces and nephews. Her husband died five days later. In the litigation which followed between the executors of the wife's estate and the administrator of her husband's estate, the Supreme Court of Pennsylvania held, following the New York cases,[8] that the opening of the deposit created a tentative trust which was revoked by the will of the depositor, reversed the lower court which had ordered the executors to pay the fund to the administrator of the husband and awarded the fund to the executors for distribution to the legatees named in the will.

It is clear that the fiction must in each instance yield to the pressure of reality so that its service is limited to the solution of those cases in which no interests have intervened during the continuance of the deposit and no testamentary disposition of the fund on deposit has been made by the depositor.

The application of the fiction, though useful in solving the problem after the death of the depositor, is dangerous if applied before the death. Courts are apt to forget that the fiction is a conscious erroneous assumption for the purpose of solving a specific problem only and not a conclusion based on the reality of the relationship of the parties. Thus is created a confusion and obscurity that seem to negative the advantages of solving legal problems by the use of fictions.

Under the tentative trust theory, the beneficiary's right remains inchoate, until the depositor dies without having disturbed the tentative trust declaration. It is important to realize that these trust deposits are as ambulatory as wills and the rights of the beneficiaries as evanescent as the prospects of legatees in the wills of living persons.

But at the moment of death, provided no intention to revoke the trust has been indicated, the rights of the beneficiary heretofore inchoate, mature and become fixed and in those states adopting the tentative trust theory, the rights of the beneficiary have been upheld.

It has also been held, and this illustrates again the confusion resulting from applying the trust concept to these accounts, that if the beneficiary dies before the depositor, the trust is terminated and the estate of the beneficiary

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[7]Scanlon's Estate, 313 Pa. 424.

[8]In Re Mannix Estate, 264 N. Y. S. 24 (tentative trust revoked by depositor's will); in Re Schrier's Estate, 260 N. Y. S. 610 (eight trust accounts revoked by depositor's will); in Re Richardson's Estate, 235 N. Y. S. 747 (a tentative trust account is not revoked by a general residuary legacy, but only by specific legacies which would fail if the trust were sustained); in Re Beagan's Estate, 183 N. Y. S. 941 (tentative trust revoked by will); in Re Murray's Estate, 256 N. Y. S. 815 (tentative trust revoked by will expressly disposing of fund in question); 42 Yale Law Journal 141, in Re Rasmussen's Estate, 264 N. Y. S. 231.

has no interest in the fund.[9]

In many states the courts have refused to accept the tentative trust theory and have taken a thoroughly realistic approach by finding that in these deposits if there is no evidence of a transfer of beneficial ownership at the time of the opening of the account, no trust was intended and no fictive solution is necessary.[10] This seems to be by far the wiser course. Whether or not other states will follow Pennsylvania and New York in the tentative trust analysis remains to be seen. The real difficulty with the tentative trust theory is not that it does not achieve correct results but that the results are obtained at the cost of confused thinking. The tentative trust theory has led to interminable litigation, as the cases in New York show.[11] On the whole, the disadvantage of applying the fiction of a trust to these accounts seems to be greater than the advantages secured. The transaction itself is a disarmingly simple one—an expression at the time of a deposit by the owner of the fund that at his death the balance, if any, shall go to a named beneficiary. This is a testamentary disposition. But it does not satisfy the statutory requirements for testamentary disposition. The solution is not a creation of a parasite on the law of trusts but the passage of a statute fixing the rights of the beneficiary.

In Pennsylvania the new Banking Code contains a provision for the payment by banks of such deposits to beneficiaries at the time of the depositor's death.[12] But this provision merely protects the bank in such payment without fixing the rights of the parties to the transaction. It would seem far more reasonable to acknowledge the true intent and right of the depositor which is complete ownership in the fund during life and to validate such deposits as

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[9]Rambo v. Pyle, 220 Pa. 235 in which the executor of the cestui que trust and the administrator of the trustee both claimed the fund, and it was awarded to the latter.

[10]In the Matter of Banfield, 69 N. E. 732 : "With the exception of the manner of opening the account, the case is barren of any proof showing any intent to vest title in the decedent. This method of opening an account is one that is frequently followed by persons for various reasons of their own, and the courts are perfectly familiar with the fact that it is done repeatedly without any intention of the depositor divesting himself of ownership in the money." Cleveland v. Hampden Savings Bank, 182 Mass. 110, in which Holmes, C. J. said : "An owner of property does not lose it by using words of gift or trust concerning it in solitude or with knowledge of another not assuming to represent an adverse interest." Peoples Savings Bank v. Webb, 21 R. I. 218; Schaefer v. Spear, 129 At. 898 (Md.); in Re Farrell's Estate, 159 At. 617 (N. J.); 59 A. L. R. 979; 3 R. C. L. Sect. 348, p. 716; Henry Parkman v. Suffolk Savings Bank, 151 Mass. 218; Nicklas v. Parker 71 N. J. E. 777; Foschia v. Foschia, 148 At. 121 (Md.); Johnson v. Savings Investment & Trust Co., 153 At. 352 (N. J.); in Re Coyle's Estate, 154 At. 744 (N.J.).

[11]In Re Kire's Estate, 248 N. Y. S. 677 (1931); In Re Schiffer's Estate, 254 N. Y. S. 871 (1931); In Re Faulkner's Will, 236 N. Y. S. 237 (1929); Tibbits v. Zink, 247 N. Y. S. 300 (1931); In Re Collin's Estate, 249 N. Y. S. 291 (1931); In Re Gate's Estate, 152 At. 374 (N. J. 1930); In Re Brazil's Estate, 216 N. Y. S. 430; In Re Kiernan's Estate, 237 N. Y. S. 290 (1929).

[12]Act of 1933, P. L. 624; also in Act of 1889, P. L. 246, Sect. 16.

testamentary transfers by appropriate legislation.

It is only by discarding the tentative trust theory and substituting enabling legislation that an honest, clear approach to the problem of trust deposits can be assured.

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THE CRIMINAL ASPECT OF SUICIDE

Suicide was murder at common law.[1] The crime required the mental element as well as the physical act.[2] It was punished by ignominious burial in the highway with a stake driven through the body and forfeiture of the perpetrator's goods and chattels to the Crown.[3] A temporary pardon of forfei-

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[1]Hales v. Petit, 1 Plowd. 253, 260, (1565); this interesting case caused Shakespeare to give it his caustic comment in "Hamlet," Act V, Scene I, see Nat Schmulowitz, "Suicidal Sophistry", 68 United States Law Review 413; I Hale P. C. 411-419; I Hawk. P. C., c. 27, 102-104; II Hawk. P. C., c. 37, 547; Sir James Fitzjames Stephen, "History of the Criminal Law of England," III, 104; William E. Mikell, "Is Suicide Murder?", 3 Columbia Law Review 393. Reg. v. Burgess, L. & C. 258, is authority for saying that there is no such offense as self-manslaughter.

[2]It might also be accidentally according to Hale and Hawkins, as where he who maliciously attempts to kill another and in pursuance of such attempt unwillingly kills himself. I Hale P. C. 412-413; I Hawk. P. C., c. 9; the perpetrator must be sane and old enough to entertain the requisite mental element. Reg. v. Moore, 3 C. & K. 319; Reg. v. Doody, 6 Cox C. C. 463; 4 Blackstone 189; Rudolph v. U. S., 36 App. D. C. 379, 385; Conn. Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 97; Lytle v. State, 31 Ohio 196; McMahon v. State, 168 Ala. 70, 53 So. 89; Rex. v. Donovan, 4 Cox C. C. 429.

[3]Hales v. Petit, 1 Plowd. 253, 261. "In Bracton's time, a person who committed suicide in order to avoid conviction for a crime, forfeited his lands, other suicides forfeited their goods only." This distinction had been dropped by the sixteenth century, Sir James Fitzjames Stephen, "History of the Criminal Law of England", III, 105; Pollock and Maitland, "History of English Law", II, 488; Com. v. Mink, 123 Mass. 422; Com. v. Wright, 26 C. C. (Pa.) 666, 667. As to what the felo de se forfeited at common law, it seems clear that he forfeited all chattels real or personal which he had in his own right; and also all chattels real whereof he was possessed, either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession, to which he was entitled jointly with another, or any account, except that of merchandise. But it is said that he forfeited a moiety only of such joint chattels as might be severed, and nothing at all of what he was possessed as executor or administrator. I Hawk. P. C., c. 27, s. 7. The blood of a *felo de se* was not corrupted; nor his lands of inheritance forfeited, nor his wife barred of her dower, I Hawk. P. C., c. 27, s. 8.; 1 Plowd. 253, 262; I Hale P. C. 413. The will of *felo de se* therefore became void as to his personal property, but not as to his real estate. 1 Plowd. 253, 262. No part of the personal estate of a *felo de se* vested in the king before the self-murder was found by some inquisition, and consequently the forfeiture thereof was saved by a pardon of the offense before such find-